Ketua Setiausaha Kementerian Dalam Negeri & Anor v The Edge Communications Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-367–11 OF 2015
ZAWAWI SALLEH, ABDUL RAHMAN SEBLI AND PRASAD ABRAHAM JJCA
24 APRIL 2017

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Civil Procedure — Judicial review — Appeal against — Respondent filed judicial review against decision of appellants in suspending respondent's publications — High Court quashed decision of appellants — Whether damages sought by respondent and ordered by High Court claimable in law — Whether there were damages to be assessed — Rules of Court 2012 O 37 & O 53 r 5(1)(b)

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The respondent had filed a judicial review application against the decision of the appellants in suspending the respondent's publications, namely 'The Edge' and 'The Edge Financial Daily' for three months from 27 July 2015, on the ground that the said publications contained 'undesirable publications' in breach of s 7(1) of the Printing Presses and Publications Act 1984. The High Court found in favour of the respondent and quashed the appellants' decision. The High Court also ordered damages arising out of the impugned decision to be assessed and paid by the appellants to the respondent. The present appeal was against the question of damages that was ordered by the High Court. The appellants submitted that the damages being sought by the respondent and so ordered by the High Court were not claimable in law and therefore juridically there were no damages to be assessed. In supporting their argument, the appellants relied on O 53 r 5(1)(b) of the Rules of Court 2012 ('the ROC').

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Held, dismissing the appeal with costs:

(1) The impugned order which was effective from 27 July–21 September 2015 had lapsed and therefore, the question of the correctness of the issue of the order for certiorari by the High Court judge had been rendered academic and the only live issue was the question of damages (see para 5).

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(2) As it was apparent from the order of the High Court that no mode of assessment of damages had been provided for, then O 37 of the ROC would be applicable ie before the senior assistant registrar. Therefore, the issues of whether the applicant had come within the bounds of O 53 r 5(1)(b) of the ROC, was a juridical issue to be determined at the hearing of assessment of damages. There was no appealable error committed by the learned High Court judge in ordering damages (see paras 9–10).

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[Bahasa Malaysia summary

Responden telah memfailkan permohonan semakan kehakiman terhadap keputusan perayu-perayu dalam menggantung penerbitan-penerbitan responden, iaitu 'The Edge' dan 'The Edge Financial Daily' selama tiga bulan dari 27 Julai 2015, atas alasan bahawa penerbitan-penerbitan tersebut mengandungi 'undesirable publications' yang melanggar s 7(1) Akta Cetakan Akhbar dan Penerbitan 1984. Mahkamah Tinggi mendapati untuk menyebelahi responden dan membatalkan keputusan perayu-perayu. Mahkamah Tinggi juga memerintahkan ganti rugi yang timbul daripada keputusan yang dipersoalkan itu ditaksir dan dibayar oleh perayu-perayu kepada responden. Rayuan ini adalah terhadap persoalan ganti rugi yang diperintahkan oleh Mahkamah Tinggi. Perayu-perayu berhujah bahawa ganti rugi yang dipohon oleh responden dan yang diperintahkan oleh Mahkamah Tinggi tidak boleh dituntut di sisi undang-undang dan oleh itu secara juridikasi tiada ganti rugi untuk ditaksir. Bagi menyokong hujah mereka, perayu-perayu bergantung kepada A 53 k 5(1)(b) Kaedah-Kaedah Mahkamah 2012 ('KM').

Diputuskan, menolak rayuan dengan kos:

(1) Perintah yang dipersoalkan yang mula berkuat kuasa dari 27 Julai–21 September 2015 telah luput dan oleh itu, persoalan ketetapan isu berhubung perintah untuk certiorari oleh hakim Mahkamah Tinggi dianggap akademik dan satu-satunya isu semasa adalah berhubung persoalan ganti rugi (lihat perenggan 5).

(2) Oleh kerana ia jelas daripada perintah Mahkamah Tinggi bahawa tiada cara taksiran berhubugan ganti rugi telah diperuntukkan, maka A 37 KM boleh terpakai iaitu di hadapan penolong kanan pendaftar. Oleh itu, isu-isu sama ada pemohon terjatuh di bawah A 53 k 5(1)(b) KM, adalah isu juridikasi untuk ditentukan semasa perbicaraan taksiran ganti rugi. Tiada kesilapan yang boleh dirayu yang telah dilakukan oleh hakim Mahkamah Tinggi dalam memerintahkan ganti rugi (lihat perenggan 9–10).]

Notes

For cases on appeal against judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5935.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680

Nam Thiam Siew v Chuang Wai Lan [1959] 1 MLJ 126, CA (refd)

Legislation referred to

Printing Presses and Publications Act 1984 s 7(1)
Rules of Court 2012 O 37, O 53, O 53 rr 1(b), 5, 5(1)(b)

Appeal from: Application For Judicial Review No 25–220–07 of 2015 (High Court, Kuala Lumpur)

Alice Loke Yee Ching (Nurul Ainy bt Yahaya with her) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
Darryl SC Goon (Raja Eileen Soraya and Joni Benedict with him) (Raja, Darryl & Loh) for the respondent.

Prasad Abraham JCA:

[1] We heard and disposed of this appeal on 30 August 2016 wherein we dismissed the appeal of the appellants. We append below our grounds for so doing. For the purposes of the appeal, we shall refer for the parties as they were described in the court below.

BACKGROUND FACTS

[2] The background facts leading to the filing of the judicial review application has been well-set out by learned counsel for the applicant in the applicant's written submissions. For ease of reference, the same are adopted herein with some modifications whenever necessary:

(a) 'The Edge' is a weekend publication. The scope of its publication as per its publication permit is on economic, management, investment and development issues. The publication permit has been issued since 1994 (see exh 'HKT1' in encl 3);

(b) 'The Edge Financial Daily' is a publication which is published five times a week. The scope of its publication as per its publication permit is also on economic, management, investment and development issues. The publication permit has been issued since 1998 (see exh 'HKT2' in encl 3);

(c) both these publications have been reporting about 1 Malaysia Development Bhd ('1MDB'), since 2009 when it was then still known as Terengganu Investment Authority (see 'exh HKT11 of encl 3');

(d) both these publications had published about 1MDB around the middle of the year 2014;

(e) by a letter to show cause dated 29 June 2015 issued by the first respondent to the applicant ('show cause notice'), the applicant was requested to show cause as to why action should not be taken against the

applicant's publications under the Printing Presses and Publications Act 1984 ('the PPPA');

(f) the show cause notice expressed specific concern with the articles on the possible financial mismanagement of 1MDB published in *The Edge* and *The Edge Financial Daily* and alleged breaches of directions, the conditions of their publication permits ('conditions of permits') and the Ministry's Publications Guidelines ('publication guidelines') ('see HKT3 of encl 3');

(g) a seven days deadline, expiring on 6 July 2015, was given to the applicant to respond to this show cause notice;

(h) as the show cause notice did not specifically provide particulars of the 'purported undesirable publications', which the first respondent contended to be in breach of s 7(1) of the PPPA, on 1 July 2015, the applicant wrote to the first respondent for it to be provided with the relevant particulars pertaining to the 'purported undesirable publications'. In the same letter, the applicant had also sought for an extension of time of twenty one days to respond to the show cause notice;

(i) according to the applicant, these two publications had published approximately three hundred articles on 1MDB. Therefore, it would not be possible for the applicant to effectively present its case for the consideration of the respondents without the benefit of the information and/or particulars of the specific articles which the first respondent had considered to be 'undesirable publications' within the context of the PPPA (see 'HKT10 to encl 3');

(j) as the applicant did not receive any response from the first respondent before the expiry of the seven days deadline given to it under the show cause notice, ie on 6 July 2015, the applicant then provided its explanation to the show cause notice. However, this was done without the benefit of the particulars of the articles it requested for, having been provided to it (see 'exh HKT5 of encl 3');

(k) on 8 July 2015, just two days after the timeline for the applicant to respond to the show cause notice was up, the applicant received a letter dated 6 July 2015 from the first respondent granting the applicant the extension of time. This letter, despite being dated 6 July 2015 was delivered and received by the applicant only on 8 July 2015. Up to this point, the particulars which the applicant had earlier requested for were not furnished to the applicant;

(l) vide exh 'HKT7' of encl 3, the first respondent called for a meeting with the applicant. The notice for this meeting was given about three hours prior to the meeting which was scheduled at 3pm on 22 July 2015. The

letter calling for the meeting was sent via fax to the applicant at 11.57am, the same day the meeting was to be held;

(m) the senior managing editor of both the publications, Encik Ahmad Azam bin Mohd Aris, attended the meeting on behalf of the applicant. The second respondent was not present. The meeting was chaired by one Hashimah bt Nik Jaafar, the Secretary of the Control of Publication & Teks Al-Quran Division of the Ministry. Throughout the said meeting there were no formal minutes recorded to reflect the agenda of the meeting and or matters which were discussed and/or highlighted during the said meeting;

(n) at this meeting, the information and/or particulars requested for by the applicant were not furnished to the applicant;

(o) on 24 July 2015, two days after the meeting held on 22 July 2015, the applicant received the suspension letter dated 23 July 2015 which ordered the applicant's two publications, *The Edge* and *The Edge Financial Daily* to be suspended the day immediately after the meeting held on 22 July 2015. The ground for the suspension as stated in the suspension letter was because the applicant's publications in these two publications contained 'undesirable publications' in breach of s 7(1) of the PPPA ('the suspension letter') (see 'exh HKT8 of encl 3');

(p) the relevant portion of the suspension letter is as follows:

> Kementerian ini mendapati kedua-dua penerbitan ini mengandungi hasil penerbitan yang tidak diingini yang *telah melanggar peruntukan Seksyen 7(1) AMCP 1984 (Pindaan) 2012* kerana mengandungi hasil penerbitan yang memudaratkan atau mungkin memudaratkan ketenteraman awam, keselamatan atau yang mungkin menggemparkan fikiran orang ramai atau mungkin memudaratkan kepentingan awam atau kepentingan Negara. (Emphasis added.)

(q) the suspension letter stated that these two publication permits were to be suspended for three months effective from 22 July 2015; and

(r) aggrieved by the above decision of the first respondent, the applicant then moved the High Court for leave for a certiorari to be issued to quash the said suspension letter. After having been satisfied that the applicant had met with the threshold for leave to be granted, the learned High Court judge had granted the applicant leave on 3 July 2015 and ordered for the substantive application for judicial review to be heard on the merits on a date to be fixed by the learned deputy registrar and upon filing of all the relevant affidavits herein.

A THE GROUNDS RELIED BY THE APPLICANT

[3] In its statement filed pursuant to O 53 of the Rules of Court 2012 the applicants raised, amongst others, the following grounds to challenge the suspension letter:

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(a) the decision is illegal and ultra vires the PPPA and unconstitutional;

(b) the decision is in breach of natural justice as the applicant was not afforded any real or fair opportunity to be heard; and

C (c) the decision is irrational and or is tainted with '*Wednesbury*'s unreasonableness'.

[4] The High Court after due deliberation caused an order for certiorari to be issued to quash the decision of the second respondent in suspending the D publication permit issued to the applicant for its publication, 'The Edge' and 'The Edge Financial Daily', for three months from 27 July 2015 ('the impugned decision'). The High Court also ordered damages arising out of the impugned decision to be assessed and paid by the respondents to the applicant (see *RR*(1) at p 110).

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[5] The respondent had appealed to this court against the order of the High Court. Counsel for the respondent had launched an attack on the entire decision of the High Court but being astute to the views this court was F expressing, senior federal counsel ('SFC') decided to confine her arguments only to the question of damages that was ordered by the High Court. Further the impugned order dated which was effective from 27 July–21 September 2015 had lapsed and therefore, the question of the correctness of the issue of the order for certiorari by the High Court judge has been rendered academic G and the only live issue is the question of damages.

[6] The respondents thrust their argument on the ground that the damages being sought by the applicant and so ordered by the High Court were not claimable in law and therefore juridically there was no damages to be assessed. H SFC for the respondents referred to the *Text Judicial Remedies in Public Law* by Clive Lewis (5th Ed) Sweet & Maxwell and we quote:

> An individual may seek compensation against public bodies for harm caused by the wrongful acts of such bodies. Such claims may arise out of the exercise of statutory or other public powers by public bodies. Decisions or measures which are ultra vires I do not of itself entitle the individual to damages for any loss suffered. Any individual must establish that the unlawful action also constitutes a recognized tort or involves a breach of contract.

[7] The applicant says otherwise. This in our view, is the quintessence of the

arguments of the respondent. We refer to O 53 of the Rules of Court 2012 in particular O 53 r 5 which we now set out and in particular O 53 r 5(1)(b) which the respondent base its arguments in this appeal.

Damages (O 53 r 5)

(1) On an application for judicial review the Court may, subject to paragraph (2) award damages to the applicant if —

(b) the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

[8] It is our view, that looking at the order of the High Court, the court ordered damages ensuing from the impugned decision to be assessed. Assessment of damages means a judicial assessment of damages that may have ensued and in such an exercise, the question of whether the respondent had satisfied O 53 r 5(1)(b) would be dealt with. An assessment of damages exercise is not confined to merely calculating the figures to constitute damages. In this regard, we refer to the Court of Appeal decision of *Nam Thiam Siew v Chuang Wai Lan* [1959] 1 MLJ 126 where His Lordship Thomson CJ (as he then was) held:

(1) the amount of damages in this case was pre-eminently a matter of assessment and not a matter of mere calculation and the trial judge was therefore wrong in ordering the damages to be assessed by the assistant registrar, but in this case the irregular assumption of jurisdiction had been waived.

[9] As it is apparent from the order of the High Court, that no mode of assessment of damages had been provided for. In our view, O 37 of the Rules of Court 2012, would be applicable ie before the senior assistant registrar. It is, therefore, our considered view, that the issues of whether the applicant had come within the bounds of O 53 r 1(b), was a juridical issue to be determined at the hearing of assessment of damages.

[10] We, therefore, find the learned judge in ordering damages arising from the impugned order which has now been quashed to be assessed did not err in law and therefore no appealable error had been committed by the learned judge. We therefore, accordingly dismissed the appeal with costs. The issues as to the head of damages being raised before us should be dealt with in the hearing of assessment of damages.

Appeal dismissed with costs.

Reported by Dzulqarnain Ab Fatar